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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN BROWN, et al.,

Plaintiff,

v. No. 02-2532-DJW

JOHN L. BAEKE, JR., M.D., et al.,

Defendant.

MEMORANDUM AND ORDER

This is a medical negligence action arising out of medical treatment sought by Plaintiff John Brown from Defendant Baeke for surgical debridement of venous stasis ulcers. Defendant Voight, CRNA, provided anesthesia services during the surgery. The matter is before the Court on

- Defendants' Motions to Strike Plaintiffs' designated standard of care expert James E. Mallow, M.D. (docs. 50 and 52);
- Defendant Baeke's Motion For Summary Judgment (doc. 54) on grounds that, without a standard of care expert, Plaintiffs are unable to establish the elements required to succeed in a medical negligence action;
- Plaintiffs' Motion for Extension of Time to Respond to Motion for Summary Judgment (doc. 59); and
- Plaintiffs' Motion to Dismiss without Prejudice to Refiling (doc. 60).

For the reasons stated below, Plaintiffs' Motion to Dismiss without Prejudice to Refiling will be granted subject to several conditions the Court believes will alleviate any potential legal prejudice Defendant may suffer. The balance of the motions pending will be denied as moot.

Procedural Background

On April 25, 2003, Plaintiffs designated their experts, including James Piontek, M.D., an anesthesiologist from Liberty, Missouri. More specifically, Dr. Piontek was to provide testimony regarding the breach of the standard of care by Dr. Baeke and Jaclyn F. Voight, as well as the issue of causation regarding Plaintiff John Brown's cardiac arrest during the debridement procedure. In addition to Dr. Piontek, Plaintiffs also designated the following experts:

- James Mallow, M.D. (Standard of Care and Causation);
- Kurt V. Krueger, M.A. (Monetary Damages); and
- Gary H. Myers, M.D. (Causation).

On October 13, 2003, Plaintiff's counsel was forced to terminate the employment of the associate attorney working on this case (and the only attorney employed by Plaintiff's counsel) due to the effect grave personal problems were having on the work performance of such attorney.

In February 2004, Defendant Voight issued a notice to take the deposition of Dr. James Piontek. When counsel for Plaintiffs contacted Dr. Piontek regarding the upcoming deposition, Dr. Piontek indicated that he previously had told counsel's associate attorney that he would not serve as an expert witness in this case because of what Dr. Piontek perceived to be a potential conflict of interest: Dr. Piontek is insured by the same insurance company that indemnifies Defendant Baeke.

After this information came to light, Defendants moved to strike Dr. James Mallow – the only other anesthesiologist designated by Plaintiffs to provide testimony on the standard of care issue – on grounds that Dr. Mallow's failure pursuant to K.S.A. 60-3412 to maintain a clinical practice for the two years immediately preceding the incident giving rise to the lawsuit disqualified Dr. Mallow as an expert in this case. Based on the potential disqualification of Plaintiff's only

remaining expert on the issue of standard of care, Defendant Baeke then filed a motion for summary judgment alleging that, without expert medical testimony that Defendants were negligent (in other words, the standard of care), Plaintiffs will be unable to establish an essential element of their claim at trial. Plaintiffs filed a motion for extension of time to respond to the motion for summary judgment and, within this pleading, advised the Court of Plaintiffs' desire to dismiss this case without prejudice so that Plaintiffs could refile the case and hire the standard of care experts necessary to support their cause of action.

The Court held a telephone status conference on May 4, 2004 to discuss the pending motions. During this telephone conference, counsel for Plaintiffs conceded they would not have the necessary expert medical testimony at trial to establish negligence, but advised the Court that these circumstances could be attributed directly to grave personal problems experienced by the associate attorney working on this case. Based on these extenuating circumstances, Plaintiffs argued that in lieu of striking their expert and granting summary judgment in favor of Defendants, the more equitable and appropriate course of action would be to permit Plaintiffs to dismiss their case without prejudice and allow Plaintiffs to refile the case to retain the necessary standard of care experts.

At the conclusion of the telephone conference, the Court removed this case from its upcoming trial setting, suspended all associated deadlines, advised counsel it would take all pending motions under advisement and instructed counsel to propose conditions of dismissal without prejudice to refiling in the event the Court granted Plaintiffs' request to do so. The parties have submitted proposed conditions as directed and the Court is now ready to rule.

Discussion

Federal Rule of Civil Procedure 41(a)(2) governs voluntary dismissals after the opposing party has filed an answer or motion for summary judgment. Once a defendant has filed an answer, as is the case here, a plaintiff may voluntarily dismiss an action only upon order of the court.[1] Rule 41(a)(2) "is designed 'primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.'"[2] Absent "legal prejudice" to the defendant, the district court normally should grant such a dismissal.[3]

"The parameters of what constitutes 'legal prejudice' are not entirely clear," but factors the Tenth Circuit has held the district court should consider include "the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of the litigation."[4] Each factor does not have to favor the moving party for dismissal to be appropriate, nor does each factor need to favor the opposing party for denial of the motion to be proper.[5] The list of factors is not exclusive and the court has discretion to, and should, consider other relevant factors in order to "insure substantial justice is accorded to both parties."[6]

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[1]Fed. R. Civ. P. 41(a)(2).

[2]*Clark v. Tansy,* 13 F.3d 1407, 1411 (10th Cir.1993) (citation omitted).

[3]*Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir.1997).

[4]*Id.* (citing *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.*, 77 F.3d 354, 358 (10th Cir.1996)).

[5]*Id.*

[6]*Id.* (citing 9 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2364 at 278 (2d ed.1994)).

Applying these factors, and taking into account the ability to impose curative conditions on the parties, the Court finds Defendants will not suffer legal prejudice if this case is dismissed without prejudice.

A. The Opposing Party's Effort and Expense in Preparing for Trial

Defendants argue they have expended substantial effort defending Plaintiffs' claims here. In support of this argument, Defendants state discovery is complete, the pretrial conference has been held and the case is on the verge of trial. Although Defendants assertions appear valid, the Court is not persuaded that this first factor weighs against dismissal. This is because, even if there is potential prejudice to Defendants with respect to the efforts they did in fact expend, such prejudice readily can be alleviated by curative conditions. While it is true that Defendants produced documents, responded to written discovery, retained experts and produced witnesses for deposition, all this discovery readily can be used in the subsequent action Plaintiffs intend to file.[7] Using discovery already conducted certainly will minimize any legal prejudice to Defendants.

Moreover, the Court believes that any further prejudice can be cured by requiring Plaintiffs to pay any duplicative expenses incurred by Defendants. Typically, a court imposes as a condition of dismissal without prejudice that the plaintiff pay the defendant's expenses incurred in defending the lawsuit, which may include a reasonable attorney's fee.[8] Plaintiff have indicated they will pursue the same claims in a new lawsuit; therefore, requiring Plaintiffs to pay any part of Defendants' expenses that are duplicative, including a reasonable attorney's fee, is a

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[7] *See Jenkins v. Unified Sch. District No. 501*, 175 F.R.D. 582, 584 (D.Kan.1997) (permitting the use of materials from discovery already conducted).

[8] *United States v. Rockwell Int'l Corp.*, 282 F.3d 787, 810 (10th Cir.2002).

particularly appropriate condition in this case.

In sum, the Court believes the ability of the parties to use this discovery in the new case combined with Defendants' ability to seek reimbursement for any duplicative expenses will alleviate any legal prejudice to Defendants with respect to the efforts and expenses expended by Defendants to date in preparing for trial in this case.

B. Excessive Delay and Lack of Diligence by Plaintiff

Defendants argue Plaintiffs excessively delayed this lawsuit by failing to diligently pursue litigation. More specifically, Defendants assert counsel for Plaintiffs offers no reasonable explanation for failing to cure expert designation deficiencies immediately after counsel terminated the employment of the associate causing such deficiencies.

The Court finds the explanation proffered by Plaintiffs with respect to expert designations establishes circumstances that are both regrettable and uniquely unpredictable in nature. Notwithstanding these expert designation issues, the Court finds Plaintiffs have been diligent in the overall prosecution of this case and have not caused excessive delay. During the course of discovery, Plaintiffs served and responded to written discovery requests, submitted to depositions by Defendants, took depositions of various witnesses and provided Rule 26(a)(2) reports from experts. In light of the totality of the circumstances, the Court finds Plaintiffs did not unduly delay or fail to diligently pursue this litigation and Defendants will not be legally prejudiced if this case is dismissed and curative measures taken. Accordingly, this second factor weighs in favor of dismissal without prejudice.

C. Sufficiency of Explanation of Need for Dismissal

The uniquely unpredictable circumstances presented with respect to expert witness deficiencies establish sufficient justification for seeking dismissal without prejudice. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals based on procedural technicalities.[9] "If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee, that bona fide complaints be carried to an adjudication on the merits."[10] The Court finds Plaintiffs sufficiently have explained the need for a dismissal and that this third factor weighs in favor of dismissal without prejudice.

D. The Present Stage of the Litigation.

Although the present stage of the litigation in this case does not favor dismissal, the four factors taken as a whole and applied to the unique circumstances presented in this case do not lead the Court to the conclusion that Defendants will suffer legal prejudice if this case is dismissed if such dismissal is subject to a number of curative conditions. Accordingly, the Court hereby **grants** Plaintiffs' Motion to Dismiss Without Prejudice (doc. 60) subject to the following terms and conditions:

(1) If Plaintiff fails to file any subsequent action within 30 days of dismissal herein, this dismissal shall convert into a dismissal with prejudice;

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[9]Fed. R. Civ. P. 1.

[10]*Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

(2) Upon refiling of this case, Plaintiffs shall be permitted to designate two expert witnesses on issues of standard of care and causation only, and Plaintiffs shall designate those experts within 30 days from the date the case is refiled;

(3) Plaintiffs shall make their experts, other than those already deposed, available for deposition within 90 days from the date the case is refiled;

(4) Upon refiling of this case, the terms of the Pretrial Order entered herein shall control;

(5) Upon refiling of this case, all discovery accomplished in this case shall carry over to the new case and discovery shall be deemed complete;[11]

(6) Upon refiling of this case, Plaintiffs shall pay Defendants' costs of transcription for depositions taken by Defendants to date;

(7) Upon refiling of this case, Plaintiffs shall pay expenses and fees incurred in having Plaintiffs' new expert opinions reviewed by defense experts as well as expenses and fees for supplemental defense expert reports necessary;

(8) Upon refiling of this case, Plaintiffs shall reimburse Defendant Baeke for time lost due to canceling patients for the days set aside for trial, which was to have commenced May 24, 2004. The amount of said reimbursement would be determinable as of June 1, 2004, as Defendant Baeke may be able to fill one or more of the dates between now and then;

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[11]The conditions presented by Defendant Baeke relating to the possibility that Plaintiff will seek to introduce evidence of his recent neuropsychological examination are not incorporated herein on grounds that imposing such conditions would premature at this time.

(9) Upon refiling of this case, Plaintiffs shall pay Defendants' reasonable attorneys' fees for the Motions to Strike or Exclude filed by both Defendants, the Motion for Summary Judgment filed by Defendant Baeke, the telephone conference conducted on May 4, 2004 and for fees incurred to respond to Plaintiffs' motion for extension of time and Plaintiff's request for dismissal;

(10) Defendants have until **June 25, 2004**, to make a detailed showing to this Court of additional expenses over and above those set forth in (6) - (9), including reasonable attorney's fees, that they believe would be duplicative if a duplicate action is filed; Plaintiffs shall have until **July 9, 2004**, to respond to that showing; and the Court will determine any amount as promptly as possible thereafter; and

(11) Failure to pay the amount set forth by the Court within thirty days after refiling will convert this dismissal into a dismissal with prejudice. The Court will retain jurisdiction over this matter to entertain a motion by Defendants to so convert such a dismissal.

In addition to the above rulings, it is further ordered that the following motions are hereby **denied as moot**:

- Defendants' Motions to Strike (docs. 50 and 52);
- Defendant Baeke's Motion For Summary Judgment (doc. 54); and
- Plaintiffs' Motion for Extension of Time (doc. 59).

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this _____ day of October, 2004.

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties